



2026:CGHC:9409

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

WP227 No. 292 of 2024

1 - Phulsundari D/o Phulchand Aged About 55 Years R/o Village Bardih,
Tahsil Lundra, District : Surguja (Ambikapur), Chhattisgarh

... Petitioner(s)

versus

1 - Rambai S/o Late Sairam Aged About 59 Years R/o Village Bardih, Tahsil
Lundra, District : Surguja (Ambikapur), Chhattisgarh

2 - Savita Singh S/o Late Sairam Aged About 32 Years R/o Village Bardih,
Tahsil Lundra, District : Surguja (Ambikapur), Chhattisgarh

3 - State Of Chhattisgarh Through Collector, District : Surguja (Ambikapur),
Chhattisgarh

... Respondent(s)

For Petitioner(s)	:	Mr. Anurag Singh, Advocate
For Respondents No. 1 & 2	:	Mr. Rajat Agrawal, Adv
For respondent No.3	:	Mr. Keshav Gupta, G. A.

(Hon’ble Shri Justice Sachin Singh Rajput)

Order on Board

23/02/2026

1. An order dated 13.03.2024 passed by 3rd Civil Judge Class- II, Ambikapur, District Surguja, Chhattisgarh in Miscellaneous Civil Suit No. 31/2017 is under challenge in this petition filed under Article 227 of the Constitution of India. By the impugned order, the learned Civil Judge allowed an application filed by respondents No. 1 & 2 under Order 9 Rule 13 of the Civil Procedure Code, 1908 (for short “CPC”) read with Section 5 of Limitation Act, 1963 (for short” Act of 1963”). Consequently, the judgment and decree dated 08.01.2008, passed in Civil Suit No.63 A/ 2005 has been set aside.

2. Learned counsel for the petitioner submits that the petitioner/ plaintiff had filed a civil suit before the learned Civil Judge against one Sairam and others which was registered as Civil Suit No.63 A/ 2005 seeking a declaration of title, possession and permanent injunction regarding properties detailed in the plaint. Respondents No.1 & 2 are the legal heirs of Late Sairam, who was original defendant No.1 in the civil suit. Sairam passed away after the passing of the decree. While the suit was pending before the learned Civil Judge, the petitioner/ plaintiff entered into a compromise with Sairam and her statement was duly recorded. However, Sairam subsequently ceased appearing before the Court and was proceeded against ex-parte. As the proposed compromise failed to materialize, the learned Civil Judge proceeded with the suit on its merits. Vide judgment and decree dated 08.01.2008, the suit of the petitioner/ plaintiff was allowed. A decree of declaration of title in respect of the properties mentioned in Schedule C and Schedule D was granted in her favour. Furthermore, the respondents/ defendants were restrained from interfering with the possession of the said properties. The aforementioned judgment and decree were challenged by other defendants before the 4th Additional District Judge, Ambikapur, and the appeal was registered as Civil Appeal No. 98 A/ 2011. The late Sairam was also arrayed as a respondent in the said appeal. The judgment and decree passed by learned Civil Judge were affirmed by 4th Additional District Judge, who dismissed the appeal vide judgment and decree dated 16.03.2016. Subsequently, the legal heirs of Sairam filed an application under Order 9 Rule 13 of CPC for setting aside the ex-parte decree dated 08.01.2008, along with an application under Section 5 of Act of 1963. The learned Civil Judge, vide the impugned order, allowed the application holding that although the application was filed belatedly, sufficient cause was shown by respondent No.1 and 2; thus the application for condonation of delay was allowed. The Court further observed that respondents No. 1 & 2 had sufficient reason for their non-appearance in the

civil suit. Consequently, the decree dated 08.01.2008 was set aside. He further submits that admittedly, the ex-parte decree which respondents No. 1 & 2 sought to set aside had already been affirmed by the appellate Court in the aforementioned appeal. Consequently, the decree is now a decree of the appellate Court. As per the explanation to Order 9 Rule 13 of the CPC, such an application is not maintainable once an appeal against the decree has been disposed of on any ground other than withdrawal. Furthermore, it is submitted that while the decree was passed in the year 2008, the application for setting it aside was only filed in the year 2017. There was no sufficient explanation provided for this delay. During the examination of respondents No. 1 & 2 before the learned Civil Judge, they admitted that Sairam was appearing in the civil suit. Consequently, the finding recorded by the learned Civil Judge in allowing the application is bad in law, illegal and liable to be set aside. Reliance is placed upon the judgment of the Hon'ble Supreme Court in the case of **Rani Choudhury Vs. Lt. Col. Suraj Jit Choudhury** reported in **(1982) 2 SCC 596** (Paras 15 & 21), and the judgment passed by the MP High Court in the case of **Sumera Vs. Madanlal and Others** reported in **AIR 1989 MP 224**. Regarding the doctrine of merger, reliance is further placed upon the decision of the Hon'ble Supreme Court in the case of **Balbir Singh and another Vs. Baldev Singh (Dead) through his legal representatives and others** reported in **(2025) 3 SCC 543**.

3. Per contra, learned counsel for respondents vehemently opposes the submissions made by the petitioner and submits that admittedly, a compromise was entered into between the petitioner and Sairam, for which the petitioner also recorded her evidence before the learned Civil Judge. It is submitted that under the impression that a compromise had been reached, the necessity to appear further before the learned Civil Judge was deemed unnecessary. Consequently, while Sairam did not appear before the Civil Court, as far as the issue of delay is concerned. It is submitted that

respondents No.1 & 2 are the legal heirs of Sairam. Following his demise, they were unaware of any ongoing proceedings. It was only when the execution of the said decree was initiated that the respondents No. 1 & 2 gained knowledge of its passing, immediately upon such discovery, they filed an application under Order 9 Rule 13 of CPC along with an application under Section 5 of Act of 1963. He further submits that as the decree was obtained by fraud, and since fraud vitiates all subsequent proceedings, the question of applicability of explanation would not come to rescue of the petitioner. Thus, he submits that there is no merit in the writ petition and it is liable to be dismissed.

4. Heard learned counsel for the parties and perused the record.
5. The factual scenario in this writ petition is, in fact, not in dispute the civil suit was filed by the petitioner against Sairam and other defendants. The record indicates that a compromise had been entered into between the petitioner and Sairam, for which purpose the learned Civil Judge recorded their evidence. However, from the record, it does not appear that the decree was passed on the basis of said compromise. Upon perusal of the impugned judgment and decree appended to the writ petition, it is quite vivid that the same was passed after the framing of issue and a decision on such issues after marshaling the available evidence. After the decree was passed, certain other defendants have preferred a first appeal before the learned 4th ADJ. It further appears that notice of the said appeal was also issued to late Sairam. Despite service, they did not appear before the appellate Court, and the Appellate Court proceeded ex-parte against him. Now, the question put forth by the learned counsel for the petitioner is whether, once the decree passed by a Court merges with the decision of the Appellate Court, an application under Order 9 Rule 13 of CPC would be maintainable. For ready reference, the relevant provision is quoted below:-

13. Setting aside decree ex parte against defendant.-

*In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit; **Provided** that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:*

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation-

Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree.

6. Admittedly, the decree passed by the Civil Judge has merged into the appellate decree. In the opinion of this Court, the explanation to the rule comes into play in this case. An identical issue has come up before this Court in the case of **Rani Choudhury** (Supra), in Para 15, the Hon'ble Supreme Court held that a plain reading of the explanation clearly indicates that if any appeal against an ex-parte decree has been disposed of on any ground other than the withdrawal of the appeal by the appellant, no application for setting aside the ex-parte decree under Order 9 Rule 13 of CPC shall be entertained. Para 15 of judgment is relevant and quoted below:-

“15. A plain reading of the Explanation clearly indicates that if any appeal against an ex-parte decree has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application for setting aside the ex-parte decree under order 9, rule 13 of the Code will be entertained. The words used in the Explanation are clear and unambiguous. The language used in the explanation clearly

suggests that where there has been an appeal against a decree passed ex-parte and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under order 9, rule 13 of the Code for setting aside the ex-parte decree. An appeal may be disposed of on various grounds. It may be disposed of after proper hearing on merits and this is usually the normal way of disposal of an appeal. An appeal may be disposed of also for non prosecution thereof. Though the dismissal of an appeal on the ground of non prosecution of the same is not disposal of the appeal on merits, yet the dismissal of the appeal for non-prosecution results in the disposal thereof. An appeal may also be dismissed on the ground of limitation, if condonation of delay in filing the appeal is not allowed by the Court. An appeal may also be liable to be dismissed for non compliance with any condition relating to the filing of the appeal and also for other reasons. An appellant is also entitled to withdraw the appeal and the withdrawal of the appeal also results in the disposal of the appeal, though in such a case no merits of the appeal are adjudicated upon. The language used in the Explanation makes it clear that the withdrawal of an appeal is considered to be disposal of the appeal, as contemplated in the Explanation. It is significant to note that though an appeal may be disposed of on very many grounds the Legislature has thought it fit to provide in the Explanation that only when an appeal against an ex-parte decree is disposed of on the ground that the appellant has withdrawn the appeal, the bar created to the maintainability of an application under order 9, rule 13 of the Code for setting aside the ex-parte decree will not apply. The Legislature must be presumed to know that there are various ways of disposal of an appeal. The Legislature has, however, thought it fit to provide that when an appeal has been preferred against an ex-parte decree, the disposal of the appeal on any ground excepting the solitary ground of disposal of the appeal by withdrawal of the same by the appellant, will create a bar to the maintainability of an application under Order 9, rule 13 of the Code of Civil Procedure. By specifically providing in the Explanation that the disposal of any appeal from the ex- parte decree on any ground other than the solitary ground of withdrawal of the appeal by the appellant, the legislative intent is made manifestly clear that in all other cases of the disposal of the appeal on any other ground than the ground of withdrawal of the appeal, there will be a bar to the

maintainability of the application under order 9, rule 13 and no application will lie under order 9, rule 13 for the setting aside of an ex-parte decree. Withdrawal of an appeal by an appellant does not result in any adjudication on merits. Even then, the withdrawal of an appeal is still considered to be a disposal of the appeal; and the disposal of an appeal only on this ground of withdrawal of the appeal by the appellant, it is made clear in the Explanation, will not create any bar to the maintainability of the application under order 9, rule 13 of the Code of Civil Procedure. On a proper interpretation of the explanation we are of the opinion that where there has been an appeal against an ex- parte decree and the appeal has not been withdrawn by the appellant and has been disposed of on any ground, the application under order 9, rule 13 of the Code of Civil Procedure will not lie and cannot be entertained.

7. Admittedly, the appeal filed by other defendants was decided on merits and was not simply withdrawn. It was also not the case that the first appeal filed by other defendants was dismissed on the ground of limitation. Following the decisions in **Rani Choudhury** (supra) and in **Sumera** (supra), the application under Order 9 Rule 13 of CPC was not maintainable once the petitioner's remedy to challenge the ex-parte decree was exhausted via the appellate process. The submissions by learned counsel for the respondents that the decree was obtained by fraud fails to stand, as perusal of the decree shows it was passed unambiguously on merits. Furthermore, other defendants who were party to the suit unsuccessfully challenged the decree before the first appellate Court. Therefore, the grounds raised by the respondents do not appeal to this Court.
8. Consequently, the writ petition is allowed. The order impugned passed by the learned Civil Judge is set aside, and the application under Order 9 Rule 13 of CPC filed by respondents No. 1 & 2 is hereby dismissed.

Sd/-

(Sachin Singh Rajput)

JUDGE

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